No. 15729

United States Court of Appeals

For the Ninth Circuit

PLUMBERS & STEAMFITTERS UNION, LOCAL NO. 598,
Appellant,

vs.

W. C. DILLION, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

BRIEF OF APPELLEE

GLADSTONE & DAY
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BRIEF OF APPELLEE

A. STATEMENT OF CASE

Appellant's statement of the case is controverted in that it states that Thorn and Marble did exactly the same work that Dillion (Appellee) would have done under his contract with Lewis Hopkins d/b/a Lewis Hopkins Company (Brief of Appellant p. 7), however, the Jury could well have found that the facts were that Appellee was to handle all the pipe from the time that it was placed on the railroad siding (Tr. 75 & 101) until it was placed in the river whereas Thorn and Marble did not handle, lay or place any pipe (Tr. 124), and the Jury could have found that Appellee would have cleared $6,000.00 on that contract (Tr. 93).

B. ARGUMENT

I.

Jurisdiction of the District Court Was Established By the Evidence

The matter of whether or not interstate commerce was involved was submitted to the Jury as a question of fact to be determined by the Jury under the Court's instructions (Tr. 201 & 203). These instructions became the law of the case since they were not excepted to by either party just the same as the instructions to the damages became the law of the case as Appellant has admitted (Appellant's Brief p. 23). Appellant now is seeking to establish error in the findings of the Jury by urging refinements of the law that should have been appropriately submitted as requested instructions to the Jury. *Persons v. Gerlinger Carrier Co.*, 227 F. 2d 337, *Mitchell v. U. S.*, 213 F. 2d 951, cert. denied, 75 S. Ct. 290, 34 U. S. 912, 99 L. Ed. 715, *Ziegler v. U. S.*, 174 F. 2d 439, Cert. denied 70 S. Ct. 68, 338 U. S. 882, 94 L. Ed. 499.

Under Sec 301, Title III of the *Taft Hartley Act* (29 USC 185) Appellee could establish jurisdiction in the District Court by showing that he had a contract with a (1) Labor Organization (2) representing employees in an industry affecting commerce.

> "From the face of the act (the Taft-Hartley Act Title III, Sec. 301, 61, Stat. 156, 29 USCA 185) it is apparent that Sec. 301 (a) and 301 (b) supplement one another. Section 301 (b) makes it possible for a labor organization, representing employees in an industry affecting commerce, to sue and be sued as an entity in the federal courts. Section 301 (b) certainly does something more than that. Plainly, it supplies the basis upon which the federal district courts may take jurisdiction and apply the procedural rule of Section 301 (b) the question is whether Sec. 301 (a) is more than jurisdictional."
>
> *Textile Workers Union v. Lincoln Mills of Alabama*, 77 S. Ct. 912, 353 U. S. 448.

Of course, the Plumbing Industry is a branch of the building trades and there is now no question but what the building trades affect interstate commerce. *NLRB v. Denver Building & Construction Trades Council*, 341 US 675, 71 S. Ct. 943, 95 L. Ed. 1284; and, especially, *NLRB v. Reed*, (9th Cir.) 206 F. 2d 184; also, *Douglas v. International Brotherhood of Electrical Workers*, 136 F. Sup. 68, wherein the Reed case is cited. Furthermore, the defendant Union has obtained certification by the NLRB on the specific representation that it does represent employees in an industry affecting commerce which fact we are sure that Appellant will not now deny.

Jurisdiction in the District Court could be predicated upon either (1) the fact that the Union is a labor organization representing employees in an industry affecting commerce or (2) that the employer is engaged in industry affecting commerce. On this appeal Appellant has so far ignored the first basis of jurisdiction in his argument and seeks to establish that because the second basis for jurisdiction does not exist in its opinion that then there is no jurisdiction in the Court. Appellee submits that even looking at it as Appellant does, the law which he cites is not sufficent to support the proposition that he urges. Looking first to the case of *Fairway Foods, Inc. v. Fairway Markets, Inc.* (Appellant's Brief p. 14) it is to be noted that this is a case under the Lanham Trade Mark Act and the Court is considering whether or not there was interstate commerce involved under that Act and not under the National Labor Relations Act. Further, the point emphasized by Appellant by that case makes it plain that local activities may affect commerce if there is a showing that the local business is part of a coordinated interstate system substantially affecting commerce (See the quotation at p. 14 of Appellant's Brief), and whether or not Appellant's construction activities affect commerce will not be measured by the activities of a grocery concern such as those involved in the Fairway Foods case, (See *Labor Board v. Jones & Laughlin* 301 US 1, 57 S. Ct. 615 where the Court said:

"Whether or not particular action does affect commerce in such a close and intimate fashion as to be subject to federal control, and hence to lie within the authority conferred upon the Board, is left by the Statute to be determined as individual cases arise.")

However, testing Appellee's activities according to the law applicable to the construction trades such as set forth in *NLRB v. Reed* (9th Cir.), 206 F. 2d 184, it would appear clear that his activities would affect commerce. This law referred to in the Reed case is as follows:

"***It has been established that, although the construction of a building is by its nature a local activity, the importation from another state of a substantial amount of the material used in it affects interstate commerce sufficiently to create jurisdiction in the Board. (p. 186)

"There is inherent difficulty in applying the National Labor Relations Act to the building and construction business. By way of comparison, we refer to the well known fact that manufacturing companies, over which the Board has exercised jurisdiction, have sufficient continuity and identity in their businesses to preclude the necessity of re-examination with each change of product, market, or source of raw materials,

while general constructing companies, by their very nature, lack these qualities in their job-to-job operations. Such lack of continuity is caused by the differences in size and requirements of each job and results in an unstable labor force both in the identity and quantity of the personnel employed. Then, too, a builder may purchase materials from out of the state in one job or do work for a company which is engaged in interstate commerce in another job; a third job may be done for a local enterprise with local materials. Nevertheless, when a builder so conducts his activities that his undertakings include both strictly local jobs and jobs affecting commerce, he is in no different position from that of a manufacturer who engages in both local and interstate activities. The employer in both instances is engaged in commerce. That part of the work force may be engaged solely on the local aspects does not deprive the over-all activities of an employer of their interstate character."

Also, it is to be noted that when the activities of Appellee are considered in their connection with the operations of the Lewis Hopkins Co. (Tr. 97-99) it would appear to fall clearly within the Rule stated at p. 188 of the Reed case where this Court said:

"***the Board has the legal power to take jurisdiction over a Company's labor problems when

> the Company's activities are a part of a single enterprise undertaken by a Company which does 'substantially affect' interstate commerce in connection with the enterprise*****"

Looking at the *Groneman* case cited by Appellant at p. 15 of its Brief, it would appear that Mr. Groneman did not have a connection with a General Contractor such as Appellee had with the Lewis Hopkins Co. in that the Court said in the Groneman case:

> "*****Groneman is operating a purely local business in no wise connected with anyone engaged in commerce,***"

Also, the Jury could have found that Appellee had many contracts in contemplation (Tr. 87, 88 & 89) while the Court found as to Groneman:

> "Neither is there any evidence that he had other other contracts *or contracts in contemplation* that might be affected by the dispute." (emphasis supplied)

Appellant's Counsel indicates difficulty in understanding the Court's comment quoted at p. 15 of his Brief which is directed to the issue as to whether or not "interstate commerce" was involved by Appellee's activities as defined in the Sherman Act, whereas he had no difficulty understanding this during the course

of the trial as noted at p. 163 of the Tr. where the following colloquy between the Court and Counsel occurred:

> "The Court: Yes. Of course, it is my understanding of it that interstate commerce has a much broader meaning and reach in the case of the National Labor Relations Board than it does in a case of the Sherman-Clayton Acts.
> "Mr. Vance: No question about it."

But on the question of the future intentions of one engaged in an industry, it is to be noted that when an employer's business is newly established and no annual figures are available, the Board customarily projects over a full year whatever figures on business volume are available. In various cases, the Board (the National Labor Relations Board) has asserted jurisdiction on the basis of projections of the business volume for a week, (*American Television, Inc. of Missouri*, 111 NLRB 164 (1955)), 20 weeks (*Carpenter Baking Co.*, 112 NLRB 288 (1955)), and 8 months (*Sarfit Lumber Co.*, 111 NLRB 657 (1955)) accord *Miller Container Corp.*, 115 NLRB 509 (1956); *Wildwood Lumber Co.*, 114 NLRB 186 (1955), (6 month figures projected). As to the use of predictions when no operating experience is available, the Board said in one case:

> "If the Company had not had any operating experience its prediction of the volume of business it would do might have served to meet our jurisdictional standards."

Local 140, *Bedding, Curtain & Drapery Workers Union* (Cenit Noll Sleep Products, Inc.) 115 NLRB 318 (1956). (In that case the Board rejected the predictions because they exceeded a projection of the company's actual sales experience during its first three months of operation, but this could not detract from the statement quoted).

Appellant's Counsel points out that the Court instructed the Jury that they could not consider loss of profits in assessing damages because to do so would be "wholly speculative and/or conjection" (p. 16 of Appellant's Brief) which only serves to emphasize the fact that the Court gave no such instruction as to the evidence applicable to the issue of interstate commerce and so it must be (and so appropriately stated by Appellant's Counsel after this point in his Brief) that "by failure to object (defendant's Counsel) acquiesced in this proposition."

It is submitted that the comments of the Court in the case of *Shore v. Building & Construction Trades Council*, 173 F. 2d. 678, furnish appropriate guides for measuring Appellee's activities in determining

whether or not they affect commerce. The Court there said:

> "***In this Act(the National Labor Relations Act) Congress has endeavored to exrecise the commerce power given to it under the constitution, Article I, Section 8, Clause 3, so far as that power will reach. Not only are labor practices which occur during the actual conduct of interstate commerce regulated, but regulation is likewise extended to certain acts which may "affect" interstate commerce. In the past decade the Supreme Court has told us in a series of decisions applicable to various aspects of Federal Legislation, how wide the power under the commerce clause is. Artificial divisions previously established between such things as production, manufacturing and transportation has been swept away. And, as Mr. Justice Frankfurter pointed out in the *Polish National Alliance Case* (322 US 643, 64 S. Ct. 1196) what affects interstate commerce is a matter of practical judgment.
>
> "***What affects the building industry in a given community affects interstate commerce and that the total effect of a 10 million dollar industry on interstate commerce is obviously very appreciable. One small stopage may not have an imme-

> diately perceptible effect upon the flow of the whole stream, but many small stopages will have such effect."

Further, this Court has previously noted that the National Labor Relations Board has established criteria under which it exercises its jurisdiction in the construction field, See *NLRB v. Reed*, Supra, where the Court noted:

> "The Board would exercise jurisdiction (over) ****any construction firm whose work affects national defense."

That the Hanford Atomic Projects Operation is a national defense project is without question as also is the fact that contract which Appellee had with the Lewis Hopkins Co. was a contract for construction of an outfall structure at the Hanford Project, a fortiori, there was jurisdiction in the instant case. *NLRB v. Stoller* (9th Cir.) 207 F. 2d 305.

Concluding, though Appellee has sought to meet the issue of jurisdiction by meeting the arguments and reasons advanced by Appellant for his claim that there is no jurisdiction, Appellee is not departing from his original premise that there is jurisdicton under the authorty of *Textile Workers Union v. Lincoln Mills of Alabama*, Supra, and the argument hereto applied.

II.

The Contract on Which the Plaintiff Sued Was Legal

Appellant's challenge to the legality of the contract on which Appellee sued (Exhibit 2) is directed to the legality of Section 3 thereof. Resolution of this issue requires first a careful analysis of the specific section which provides:

> "The employers agree to hire all employees covered by this Agreement from and through the Unions and to retain in its employ only members in continuance good standing in the Unions."

This is the first sentence of the first paragraph of Section 3. The appropriate rules of construction, which are Textbook Law, are that doubts in construction will be resolved against the maker of the contract, 12 Am. Jur. Contracts, Sec. 252, p. 795, and a contract will be construed with every fair intendment towards legality rather than illegality, 12 Am. Jur. Contracts, Sec. 251, p. 793. With these rules in mind then, we examine the first sentence quoted and we note that the employer's did not agree to hire simply "all!" employees from the Union but only "all employees covered by this Agreement" from the Union. Certainly it was contemplated by the parties to the agreement that the employers could have employees other than

Union members otherwise the words "covered by this agreement" would have no significance whatsoever, and since it was not exclusionary this part would not be illegal. The employer's agreement "to retain in (their) employ only members in continuing good standing in the Union" is modified by the second paragraph of Section 3 in that the second paragraph specifies generally the procedure by which non-union members are to be terminated in their employment in that it states:

> "The employers agree to forthwith discharge any employee upon written notice from the Union that such employee is not in good standing in the Union."

Since 29 USCA Sec. 158, (a) (3) specifies that it would be:

> "An unfair labor practice for an employer***to interefere with, restrain, or coerce employees**** by discrimination in regard to*****tenure of employment, provided that nothing in this subchapter****shall preclude an employer from making an agreement with the labor organization****to require as a condition of employment membership therein on or after the 30th day following the beginning of such employment or the effective date of such agreement, whichever is the later*****"

The question then becomes, does this last quoted paragraph of the Agreement require a discharge prior to the expiration of thirty days from the beginning employment or the effective date of the agreement? Having the two general rules of contract construction in mind as previously noted it is submitted that a proper construction of this provision would require a legal construction and this would mean that the discharge would take place only after the lapse of the requisite thirty day period. This might in a strict sense put into focus the meaning of the word "forthwith" as used in the second paragraph of Sec. 3, and the following definition is therefore appropriate:

> "Forthwith. The term has been said to be an elastic one, with a relative meaning, depending in any case on the circumstances.
>
> "In more technical applications* *within such time as to permit that which is to be done to be done lawfully." 37 C.J.S. 128.

In interpreting the NLRB section in question, the Courts have held that a hiring hall arrangement is not *per se* unlawful in the absence of evidence that the Union unlawfully discriminates in supplying employer with personnel. *Eichlay Corporation v. NLRB* 206 F. 2d 799 and *NLRB v. Radio, Etc. Union*, 347 U.S. 17, 74 S. Ct. 328. In this respect, it is appropriate to

note the case of *NLRB vs. N.M.U.* cited by Appellant at p. 17 of his brief, where the Court said:

> "Most of the contentions made by respondents in this Court were considered and satisfactorily answered in the Board's decision. There is no need to discuss the Board's answers in detail. Suffice it to say that the Board did not hold violative of the Act mere hiring hall provisions of the Agreement which respondents demanded of the employers. In its decision, the Board said "***We do not pass upon whether or not the hiring hall provision would be unlawful absent evidence that in supplying the companies with personnel NMU discriminated against non-members. The record establishes, and we find, that in the operation of the hiring halls in question, such discrimination against non-members did exist ***. In disposing of this contention it is not necessary for us to determine whether an employer would violate Sec. 8 (a) (3) by the mere act of executing a contract containing the hiing hall clause, the performance of which we have found would, under the conditions here present, violate the provisions of the Act.***"

The same thing is true of the *NLRB v. Alaska Steamship Company* case cited at p. 17 of Appellant's brief. Hence the Court noted in that case that the Board

found "***that, pursuant to the preferential hiring provisions of the agreement, Underwood was denied employment with the Company because he had resigned from membership in the Union." Also, it should be noted as to this last cited that the Court did not review the Board's determination of law, and pass on it, but it merely notes what the Board found.

Referring to the *Lewis v. Jackson and Squire case* cited by Appellant at p. 17 of its brief, Appellee would point out that the Court there first found that the agreement was to be construed under the laws of the State of Arkansas and that

> "unquestionably, closed shop and union shop agreements are unlawful in Arkansas."

so that the case is not authority for the proposition that the contract closed shop provision was invalid under the Natinal Labor Relations Act. The case is authority for the proposition that it is necessary to determine whether or not, if a provision is found to be invalid, it invalidates the whle contract. The Court there said:

> "It is necessary to determine if this provision (a closed shop provision(is separable from the other parts of the agreement so that it may be discarded and the remainder enforced."

Answering this, the Court said:

> "Apparently the parties to the agreements intended that the union shop provision as well as all other provisions be essential, for the agreements themselves provide: 'this agreement is an integrated instrument and its respective provisions are interdependent***' Furthermore, it is apparent that the United Mine Workers of America would not have entered into the agreements had the union shop clause not been inserted. This is manifested by the fact that the union conducted a strike in support of its position that its agreements contain a union shop clause, and in a recent case for the NLRB, the Board found that the Union had violated Sec. 8 (b) (2) in the Labor Management Relations Act of 1947, by reason of conducting a strike in support of its contention that its agreements include a union shop provision."

In our case, the agreement (Exhibit 2) did not contain a provision requiring that it be construed as an intergrated instrument nor state that the provisions are interdependent.

As we have noted above, illegality depends on both an improper contractual provision as well as a showing of discrimination in furnishing employes under

the provision. It is well to note that the record in our case shows no such discrimination and the *Lewis v. Jackson and Squire case*, Supra, is authority for the proposition that the record would have to show the discrimination (See also *NLRB v. International Union of Operating Engineers, Local* 12, 237 F. 2d 670. (Ninth Circuit)) and the Court could not assume this fact from circumstances dehors the record. In this respect, the Court said:

> "Furthermore, while the Court is advised, dehors the record, that the United Mine Workers of America have not complied with the Labor Management Relations Act, yet, the record before the Court does not contain any proof of such uncompliance, and therefore, the Court does not pass on this contention of the defendant."

Appellant next cites certain cases which emphasize the proposition that if an illegal provision is found in a contract it does not invalidate the whole contract unless the "fabric of illegality" ran "through the entire contract." *Local Union* No. 420 *v. Carrier Corporation* cited by Appellant at p. 18 of its brief. In that case, the Plaintiff was specifically relying on, or as the Court said, "leaning" on the illegal provision in order to recover. In our case, just the opposite prevails since Appellee has not relied on the disputed provision, Sec. 3 of the Agreement (Exhibit 2), at any time in claiming his rights.

In the case of *Local* No .234 *of the Plumbers Union v. Henley and Beckwith, Inc.* cited by Appellant at p. 19 of Appellant's brief, it should be noted first that the validity of the closed shop provision was tested against the Florida law and not against the National Labor Relations Act. Secondly, the Court in that case notes that there are "conflicting views on severability of closed shop clauses" and refers to anno. 14 A.L.R. 2d 846. The annotation referred to by the Florida Court, supra, sets forth:

> "While it would seem that the provisions of the particular contract under consideration should govern, it may be noted that in the *majority* (emphasis supplied) of the few cases raising the question, it has been held or recognized that the provisions of the collective bargaining labor contract involved were severable." (Citing cases from Arkansas, Massachusetts, New Jersey, North Carolina and Tennessee.)

The Florida Court then entered its decision on the side favoring nonseverability rather than listing itself among the cases favoring severability.

Again, basic to the determination of the issue of severability are the rules of construction noted above that the Courts favor a legal construction of contracts and that doubts as to construction will be resolved

against the party who caused the contract to be prepared which latter rule received approval by the trial judge in our case when he made that statement (Tr. 168) quoted by Appellant at p. 21 of his brief.

Appellant's counsel points out that the National Labor Relations Board acts only to effectuate public policy and not to vindicate private rights. (Citing the *Haleston Drug Stores v. NLRB* in support thereof at p. 21 of Appelant's brief). Since Appellee was seeking relief from the Federal District Court under Sec. 301 of the National Labor Relations Act, he has no quarrel with this proposition as to what is required of the Board. Certainly there is no question but what Sec. 301 was enacted for the purpose of providing a forum for vindicating private rights. *Textile Workers Union v. Lincoln Mills of Alabama,* supra. Also no issue is made of the proposition that public policy is involved in the matter of closed shop provisins and collective bargaining agreements and this was appropriately considered by the Court in considering the issue of severability, the issue of validity, the question of whether plaintiff must rely on the invalid provision, if it is found to be such, in order to recover and the question of whether there has been discrimination coupled with an invalid provision as discussed above.

III.

The District Court did not err in refusing to grant the Appellant a new trial on the ground that the verdict of the jury was so grossly excessive as to be not s u p p o r t e d by any evidence.

At the outset, we would say that we concur with Appellant that the instruction of the trial court as to damages became the law of the case. In this respect, it should be noted that colloquy between Court and counsel which took place when the Court's proposed instructions were in the hands of counsel (Tr. 183 and 184) gave specific notice to Appellant's counsel that damages for loss of business was an item of damage contemplated by the instructions where the following was said:

> "Mr. Gladstone: Yes, Your Honor, We feel that one of the specific items of damage, it is an over all item, is the matter of the loss of the entire business.
>
> The Court: Well, that is a different matter. Loss of an existing business,**
>
> Mr. Gladstone: I mention his loss of business just as a preamble for the reason why we felt that it tied in. We feel that the jury should be instructed to determine the damages that reasonably

flow, that in determining the value of the business, they could consider the contacts that he had made, whether or not it would be reasonable that he would have continued in business for any period of time that was within reason and might reasonably could have expected, considering the tools, the equipment, that he had, the background that this man had, and the contacts that he had made, all of these things, just whether it would be reasonable for him to have continued in business, which would be an item appropriate for their consideration in determining the over all value of the business that he lost.

The Court: And would have got a construction contract for a million and a half dollars on which he might have made a profit of $500,000 and, therefore, $500,000 would be reasonable for the jury to award.

I will tell you, a verdict based on that kind of instruction, the verdict wouldn't be worth a plug nickle to you, the Court of Appeals would reverse it so fast you would have it right back here again, and I think I ought to instruct the jury that they shouldn't consider prospective profits on contracts which he doesn't have which he might get in the future. That doesn't keep you from arguing the business loss and what his prospects were on that.

Mr. Gladstone: May I ask, then, if our argument was along the line that I have outlined, would I be outside the instructions?

The Court: No, as long as you keep away from the profits which he might have earned on contracts which he might have procured had he stayed in business and which he didn't have at the time he quit.

Mr. Day: I was thinking, your Honor, of alluding, for instance, to the testimony of all of the adverse witnesses that there was a great demand or need for fabricators, subcontractors.
The Court: Well, that is business prospects in the light of the circumstances there. I don't think that that would be out of line."

Since Appellant's counsel admits the instructions became the law of the case and since the instructions plainly allowed the jury to allow damages for the loss of Appellee's business, Appellant cannot claim that error.

In our case under the general instructions, and the evidence and the reasonable inferences therefrom, the jury could well have found that Appellee's business was entirely destroyed as a result of the breach of contract by the Appellant. Appellant's citation of 25 C.J.S. Damages, Sec. 90 b, p. 633 at p. 26 of his

brief, although purporting to cover injury, interruption and *destruction* of a business, actually discusses only diminution in value. Nevertheless, that portion from the same authority at p. 811 would seem to be applicable, but it is important to note that there is nothing in this authority to indicate that it purports to set out the *exclusive* means of establishing value of a business.

The case of *U. S. v. Griffith, Gornall and Carmen, Inc.* cited by Appellant at p. 27 of his brief, is as they noted, a tort action rather than a contract action. If it had been a contract action, the Court would have referred specifically to the same authority (15 Am. Jur. Damages) but Sec. 133 therof at p. 541, where it is said:

> "The destruction or interruption of a business, or an injury tthereto, by the wrongful act of another is a proper element of damage, provided, of course, it is the natural and proximate result of such act, and the injured person is entitled to recover all such damages as are the natural and proximate result of the wrongful act complained of. If the injury results from a breach of contract, the parties may fairly be presumed to have contemplated that the breach would result in such injury. If it is certain that damages of this kind have been caused by the wrongful act

of the defendant, a recovery will not be denied because of uncertainty as to their amount."

Appellant then relies on this case as support for the proposition that future profits could not be recovered. We have no quarrel with this since as previously noted, the Court specifically excluded future profits from consideration by the jury in its instructions. Appellant argues that in that case there was an "established" business and seems to infer that Appellee did not have his business established. The jury could well have found that Appellee worked long and hard and tenatiously in getting his equipment together (Tr. 65), getting his business location (Tr. 63), getting lined up with the union in order that he might obtain union labor (Tr. 61), obtaining technical background information (Tr. 59), lining up his capital (Tr. 59), and attending to the many other details involved in his preparation for going into business and Appellant might point to circumstances where efforts were made by Appellant to prevent Appellee from getting a collective bargaining agreement which would have prevented him from getting union men and would have effectively prevented him from going into business, (Tr. 69, 70, 71 and 72). They nevertheless did not succeed. The jury could well have found that Appellee did get his collective bargaining agreement and he did commence business pursuant to the contract with the Lewis Hopkins Company (Tr. 76, 77 and 78)

and that Appellant did not succeed in preventing Appellee from becoming established in his business.

Appellant cites the case of *Southern Pacific v. Guthrie* at p. 29 of its brief in support of the proposition that the verdict is excessive. This was a tort case rather than a contract case. It is important to note there that this Court said:

> "When the trial court is presented with a motion for a new trial grounded on a claim of an excessive verdict, its power to deal with the motion is not limited to questions of law. The same power and duty which the trial judge has to set aside any verdict and grant a new trial when he is of the opinion the verdict is against the weight of the evidence, is that which the trial court frequently exercises in ordering a new trial, or in conditioning denial of a new trial on a remittitur because, in the opinion of the court, the amount of the verdict is against the weight of the evidence. *But this power and duty belongs exclusively to the trial judge.* It is not for us to give directions in such a case, even although he may have declined to take action, such as we consider we would have done had we been in his place (citing *U. S. v. Socony Vacuum Oil Company*, 310 U. S. 150. 60 S. Ct. 811 (emphasis supplied)).

"We are convinced that even if we assume as we do, that (cases cited) were correctly decided, we cannot here reverse the action of the trial court unless the verdict can be said to be 'grossly excessive', or as stated in the *Affolder* case, 'monstrous'. We think the verdict in this case cannot be so characterized."

It is submitted that applying the rule of this case to our case, Appellant has not pointed out any facts which would indicate that the verdict is "grossly excessive" or "monstrous."

Appellant next cites the case of *State of Washington v. U. S.* at p. 29 of his brief, where this court held:

"On the question of the sufficiency of the evidence to support a verdict 'the evidence adduced by the opposing party shall be taken as true and all reasonable inferences deducable therefrom shall be given their most favorable intendment.' (citing)

"Where there is substantial evidence on both sides of an issue, the Court is not free to reweigh the evidence and substitute its inference or conclusions for that of the jury (citing). However, in making the primary determination as to whether or not there is substantial evidence, a District Judge is not a 'mere automaton' (citing).

He must determine, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it.'

"The crux of the matter is whether there is substantial evidence to support the verdict. This has long been the rule of this Circuit Court."

It is interesting to note that the trial judge who heard the case of Appellee and reviewed the jury's verdict was the same judge who set aside the verdict in deference to the rule and his duty set forth in the cited case, and we can therefore say without fear of contradiction, that he was well aware of his obligation and his duty as outlined in the cited case when appellant's motion for new trial was presented.

The *Southern Pacific v. Guthrie* case was cited in the case of *Siebrand v. Gosnell*, 234 F. 2d 81 (Ninth Circuit) where the Court held:

"Siebrand Brothers attacked the $95,000. judgment against them as excessive. We are required to consider the evidence in the light most favorable to the Gosnells***

"The Trial Court considered Siebrand Brothers contention on a motion for a new trial and denied the motion. The action of the trial judge on such

motion for new trial 'is not limited to questions of law', but he may 'grant a new trial when he is of the opinion the verdict is against the weight of the evidence*** (citing)."

"The power of the Court of Appeals is not as broad as that of the Trial Court. Absence the total want of evidence on all or certain portions of the case or the erroneous exclusion from consideration by the Trial Court of appropriate matters or a showing of bias or prejudice on the part of the jury, this Court may not reverse the trial court unless the verdict can be said to be grossly excessive or monstrous. (here citing *Southern Pacific Company v. Guthrie*). None of such elements are present in this case.

"****The Trial Court passed on the question on the motion for new trial and we cannot say that the verdict is so grossly excessive as to show an abuse of discretion on its part.* (citing)." (emphasis supplied)

Appellant cites the *Ford Motor Company v. Mahone* case at p. 29 of its brief in support of the proposition that a remittitur is not adequate. However, there the Court found specific facts and circumstances that occurred during the trial that gave rise to an excessive verdict resulting from pity and sympathy brought about by the Plaintiff appearing in a wheelchair be-

fore the jury. The Court also found that this was coupled with partisanship on the part of one of the jurors. (One of the jurors attempted to send Plaintiff's counsel a message designed to aid him in his conduct of the case during the trial.) We have no such circumstances even remotely approaching those facts in the case on appeal.

Appellant cites the case of *Stott v. Johnston* at p. 30 of his brief and Appellee would agree that this case does set forth a fair statement of the applicable law. Rather than taking one statement out of the context, however, the case would be more fairly presented if the statements of the court were more fully set forth as follows:

> "***These were all simply instances of conflicting evidentiary considerations for the jury to resolve in the determination of plaintiff's right to recover damages for the alleged loss of good will. In such circumstances, there need be no citation of authority for the proposition that the jury's rejection of defendant's views and acceptance of plaintiff's claim are conclusive on this appeal.
>
> "However, in a case of this kind there must be recognized the difficulty in the proof of damages put upon the plaintiff and there seems to be no

prescribed pattern of precisely what evidence should be introduce.***"

"The propriety of the allowance of $10,000. to plaintiff for the loss of good will, must be considered in relation to the nature of the evidence available to plaintiff in proof of this issue. Analogous considerations have arisen in cases where recovery for loss of future profits was sought, and the Courts have been reluctant to reverse a reasonable damage award because the precise amount of damage was not definitely ascertainable. In this regard it appears to be the general rule that while a plaintiff must show with reasonable certainty that he suffered damage by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment. See Annotation 78 A.L.R. 858; 25 C.J.S., Damages, Paragraph 28, pages 493-496.

"***Under all the circumstances here, it is difficult to see what additional evidence Plaintiff could have introduced on the damage issue. The law only requires that the best evidence be adduced of which the nature of the case is capable, *Steel Duck Company v. Henger-Seltzer Company*, 26 Cal. 2d 634, 651, 160 P2d 804, and the defen-

dant whose wrongful act gave rise to the injury will not be heard to complain that the amount thereof cannot be determined with mathematical precision. *Hacker Pipe & Supply Co. v. Chapman Valve Manufacturing Co.* 17 Cal. App. 2d, 265, 267; 61 P2d 944."

It is submitted that Appellee produced all of the evidence available to him on the matter of the value of his busines. The jury could have, and apparently did find from the evidence reasonable certainty that Appellee was damaged in the loss of his business and that Appellant caused this damage and the jury then had the task of establishing the amount of loss of the damage but as has been repeatedly pointed out, recovery will not be denied because the damages are difficult of ascertainment.

CONCLUSION

Appellee respectfully submits that there was ample proof to justify a verdict by the jury concluding that there was an effect on interstate commerce which gave the court jurisdiction and that there was ample evidence to justify the verdict by the jury concluding that there was reasonable certainty that Appellee had suffered damage by reaosn of the breach of contract by Appellant and there was ample evidence to justify the verdict in the sum of $40,000. Appellee further

submits that the facts presented in the Court below and the law applicable justify only one ruling which is that the contract on which the plaintiff sued was legal. Appellant should not therefore be granted a new trial and the verdict should be upheld.

Respectfully submitted,

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